

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF SOUTH DAKOTA

3 SOUTHERN DIVISION

4 * * * * *

Civ. 15-04189

5 DENNIS NEUGEBAUER,

6 Plaintiff,

7 -vs-

8 AMERICAN FAMILY MUTUAL
9 INSURANCE COMPANY,

10 Defendant.

11 U.S. Federal Courthouse
12 Sioux Falls, SD
13 July 7, 2016
9:00 a.m.

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15 H E A R I N G

16 * * * * *

17 BEFORE: The Honorable Karen E. Schreier
U.S. District Court Judge
Sioux Falls, SD

18 APPEARANCES:

19 Mr. Derek A. Nelsen
Fuller & Williamson, LLP
20 7521 S. Louise Avenue
Sioux Falls, SD 57108
21 (appearing by telephone)
for the Plaintiff22 Mr. Steven J. Morgans
23 Myers Billion, LLP
PO Box 1085
24 Sioux Falls, SD 57101-1085
(appearing by telephone)
25 for the Defendant

* * * * * JULY 7, 2016 * * * * *

(In open Court, counsel appearing by telephone,
at 9:00 a.m.)

THE COURT: This is the time scheduled for a
hearing in the matter entitled Dennis Neugebauer vs.
American Family Mutual Insurance Company.

Would counsel please note their appearances
for the record?

MR. PREHEIM: Eric Preheim on behalf of the
Plaintiff, Dennis Neugebauer.

MR. MORGANS: And Steve Morgans on behalf of
Defendant, American Family Mutual Insurance Company.

THE COURT: I've read the briefs from both
sides. Mr. Preheim, did you want to add anything
else?

MR. PREHEIM: I would rely primarily on our
brief.

I do have a little argument in the sense of
kind of just emphasizing that this issue has -- these
discovery issues have been repeatedly litigated in
South Dakota Federal District Court, and we think this
issue is not really a novel issue, though it is an
important issue.

So I don't want there to be any impression
that just because this has been done, that in this

1 case this is any less important to my client,
2 Denny Neugebauer.

3 I intend to get into more of an argument
4 that's structured, if the Court is willing to
5 entertain it. However, I don't need to. I would rely
6 on the brief, if needed.

7 THE COURT: Thank you. Mr. Morgans?

8 MR. MORGANS: Yes, Judge. I would primarily
9 rely on the briefs, as well. I would just like to add
10 a few comments or argument in addition to the briefs.

11 As I mentioned in our opposition, Judge,
12 Defendant believes that the context and factual
13 backdrop of the claims at issue in relation to the
14 request and the burdens involved in producing
15 information are critical in the valuation of these
16 discovery issues.

17 In this matter, and even from Plaintiff's
18 first brief and motion to compel, and even starting
19 with the Complaint in the first instance, the factual
20 backdrop of the claims has shifted, as we outlined in
21 our briefs, in the sense that the primary focus in the
22 Complaint was based upon a June storm back in 2014.

23 Now there has been a recognition of a second
24 storm, and now I believe there's even been in the
25 reply brief a recognition that the first inspection

1 that was complained of, where there was no repairable
2 damage noted by American Family, that that inspection
3 occurred actually the morning of the second storm in
4 June of 2014. I think it's important to note that
5 context.

6 And then the fact that, at least as far as I'm
7 aware, there's been no complaints as to the timeliness
8 involved and the reasonableness -- or in the
9 timeliness of the first inspection and when the second
10 inspection occurred and when the appraisal process
11 occurred, that if Plaintiffs have possession of the
12 claims file and claims notes, and I think at the times
13 when those were requested or followed up by
14 Mr. Neugebauer, that those occurred.

15 So what the dispute boils down to now is
16 whether Mr. Neugebauer was -- whether the damage to
17 his roof merited a full roof replacement, or whether
18 the second estimate or the appraisal process that
19 found damages in the -- and I'm just generalizing,
20 Judge, for context -- but in the neighborhood of about
21 \$4,000 or around \$14,000 was the correct frame of
22 reference.

23 So I think those facts are important when we
24 consider the proportionality of the discovery
25 requests.

1 Defendant is aware of some of the prior
2 decisions in some of these areas, but would just
3 submit that each case is unique on its own facts, and
4 that this case is unique in that sense in that when
5 you consider the specific allegations of bad faith in
6 this case that have shifted, that there is no -- there
7 isn't anything sitting in the claims file, or even on
8 the face of it, that is something that would be akin
9 to, for instance, the Gowan decision where there was a
10 note in the file that said, "File strategy goal: Deny
11 further." There isn't that type of situation here.

12 So what Defendant American Family attempted to
13 do is to really limit this as substantial corporate
14 discovery set that we believe goes beyond
15 proportionality of the case and issues.

16 I know I went probably longer than I intended
17 on the factual backdrop. Let me just note two things
18 in the particular issues beyond the briefs.

19 The first, in regards to the issue on
20 personnel files, Judge, as has been I think briefed by
21 both parties, Defendant has produced the personnel
22 files and the compensation information on the four
23 employees personnel that were directly involved in
24 this claim, as well as their supervisor, and we
25 believe that the issue is going beyond that. What is

1 reasonably to be produced?

2 I want to point out that as part of
3 Plaintiff's brief, one of the reasons they argue for
4 the extent of personnel -- well, actually I'm going to
5 slightly change direction.

6 On the personnel file, I just wanted to
7 reiterate that in the Gowan decision, for instance, as
8 we look at the cases that talk about how far you go in
9 production of these personnel files, that we do not
10 have an instance where there is a tie-in to the
11 Plaintiff's claims in any type of allegations against
12 the supervisors.

13 What I was referencing before was actually in
14 regards to the claims files or all documents related
15 to Heather Steffens over the last ten years that she's
16 investigated, and I wanted to factually note that.
17 Because in Plaintiff's brief they mention that she was
18 the one who, in addition to initially determining no
19 damages, that she later identified damages, and the
20 actual amount is \$3,781.19.

21 The claims notes reflect that she -- that
22 actually was not her. It was Richard Finley. I raise
23 that because the bases for those requests are based on
24 inaccurate facts. As this Court is aware, as we go
25 through --

1 THE COURT: So are you saying Heather
2 Steffens is not the one that initially determined that
3 there was no damage?

4 MR. MORGANS: No. She was the one who
5 determined there was no damage. I think the gentleman
6 that had -- that did the reinspection, I believe, is
7 the employee whose file was produced was
8 Richard Finley, Judge.

9 Because there was argument in the brief from
10 Plaintiff's counsel about Heather Steffens and her
11 stating there was zero damage, and then later a higher
12 amount, that's a reason and basis for that request. I
13 just wanted to clarify that.

14 THE COURT: So is Heather Steffens the
15 claims adjustor assigned to this claim?

16 MR. MORGANS: No. Heather Steffens was I
17 think a cat, catastrophe adjustor, actually based out
18 of I think Iowa, Judge, and I think they travel to
19 perform these inspections.

20 It's my understanding that her limited role
21 was to do that initial inspection and provide that to
22 American Family. So she was not like the claims
23 handler through the first year of the file.

24 THE COURT: So is she an employee?

25 MR. MORGANS: She would be considered an

1 employee, I believe, Judge.

2 THE COURT: And she's assigned to wherever
3 there are catastrophic incidents, to go and do the
4 adjusting?

5 MR. MORGANS: That's my understanding.

6 I did want to spend just a little bit of time,
7 Judge, on the request as to I guess what I would
8 identify as trying to identify nationally
9 case-specific similar situations.

10 I would start by saying I'm not sure I've ever
11 seen a more broad and burdensome request in my years
12 of practice, to require any Defendant to do that type
13 of review and analysis.

14 Obviously when you start with -- what requests
15 for production typically do is identify the documents
16 in possession. I know at some point that can raise up
17 the level of analysis to where they are having to
18 analyze data.

19 But as that data is having to be analyzed
20 versus documents in possession, the burdensome nature
21 of those requests obviously raises substantially as
22 further analysis is needed.

23 When you look at that specific request --

24 THE COURT: So are you talking about
25 Request No. 8, Request for Production No. 8?

1 MR. MORGANS: Correct. That they would have
2 to do a national review of all claims files, identify
3 any claims files, or produce any claims files, and
4 claims forms completed, et cetera, related to hail
5 damage, including log entries, evaluations, reserves,
6 where American Family initially claimed that there was
7 no damage to shingles covered under policy, but where
8 they later determined there was damage to shingles. I
9 would respectfully disagree with counsel that that
10 would in any way, means, or form be a needed process.

11 I understand that's not in and of itself a
12 reason for a nonproduction, Judge. But in the
13 analysis of proportionality, and considering some of
14 the factual misunderstandings of what we are dealing
15 with here, including the fact that this is having us
16 analyze where there was initial denial, and we have
17 this very unique situation where we have a second
18 storm event the date after -- or the same night that
19 the first inspection was creates just what we believe
20 is an extremely tenuous reach and a very overly
21 burdensome request.

22 THE COURT: So did you prepare a privilege
23 log?

24 MR. MORGANS: A privilege log has not been
25 completed, Judge.

1 THE COURT: So you claimed attorney-client
2 privilege.

3 MR. MORGANS: There are some portions. Part
4 of that is I've requested clarification on some of the
5 production from corporate counsel as to what that
6 identifies. We need to complete that, Judge.

7 THE COURT: So Rule 26(b)(5) says that if
8 you're claiming privilege, that the party must
9 expressly make the claim and describe the nature of
10 the documents, communications, or tangible things not
11 produced or disclosed. "Must" means you have to do it
12 if you are claiming attorney-client privilege.

13 MR. MORGANS: And I don't disagree with
14 that, Judge.

15 THE COURT: Or the privilege is waived. Do
16 you understand that?

17 MR. MORGANS: Yes. Judge, we simply -- we
18 don't dispute that that was required, and that I was
19 in discussions with counsel as far as timing of
20 getting that done, and the motion to compel came. I
21 understand that there are no excuses for that.

22 THE COURT: So the general objections that
23 you filed, the first one indicated that no documents
24 would be turned over until a protective order was in
25 place. One is now in place. Right?

1 MR. MORGANS: Correct. That's true.

2 THE COURT: Mr. Preheim, with regard to the
3 time frame of all of the requests, it appeared to me
4 that the plaintiffs indicated that it could be reduced
5 to a five-year time period instead of the ten years
6 that was in the written Interrogatories and Request
7 for Production of Documents. Is that correct?

8 MR. PREHEIM: I think that's correct only
9 with regard to Interrogatory No. 13, we agreed to
10 reduce from 10 years to five years.

11 All the other time periods have remained the
12 same as originally requested.

13 THE COURT: Okay. As an overall matter, I
14 think a five-year time period is appropriate and will
15 apply to all of the requests.

16 MR. PREHEIM: Understood.

17 THE COURT: The other general objection by
18 the Defendants was to claims outside of South Dakota
19 dealing with hail loss.

20 Does anyone want to address that specifically?

21 MR. PREHEIM: Yes. I can go with that,
22 Your Honor. With regards to, again, the outside of
23 South Dakota, this argument has again been made and
24 remade and remade and remade. I think we're about six
25 or seven times now that this argument has been

1 formally made by various insurance companies.

2 The problem with the argument about limiting
3 it to just South Dakota, in this case Neugebauer is
4 alleging that American Family has a systemic practice
5 of initially denying or -- denying outright
6 completely, or coming up with a number that's less
7 than the deductible after the initial investigation.

8 Then and only then, after the insured comes
9 back and says, "Well, that can't be, it doesn't make
10 sense," that they do another investigation. Then they
11 come back with a little bit more. That's essentially
12 what's happened here.

13 That isn't limited to just South Dakota. That
14 type of a thing doesn't depend on the law in any other
15 state. That type of thing, whether it happens in
16 North Dakota or South Dakota or any other state, it
17 will still help demonstrate the pattern and the
18 practice that American Family has demonstrated here.

19 That's why it should not be limited to
20 South Dakota. There are other cases that have
21 addressed this issue. We've outlined those in our
22 briefs, where again we don't need to be limited to
23 just South Dakota claims handling in order to figure
24 out -- or to establish, I guess I should say, not
25 figure out. We know it's already happening here.

1 But to establish just how widespread of a
2 problem or practice this is, to limit it to South
3 Dakota is to essentially deprive relevant information
4 from a plaintiff that is alleging a systemic-wide
5 practice in an insurance company that is outside of
6 South Dakota.

7 For those reasons, we think that the general
8 objection is just -- it shouldn't be made
9 procedurally, and it's also just in this case
10 inappropriate.

11 THE COURT: Mr. Morgans?

12 MR. MORGANS: Judge, I would just go back to
13 Defendant's position on the comparison of the specific
14 facts of this case and the allegations.

15 Obviously in any case we can have allegations
16 of a systemic-wide, corporate-wide practice of
17 anything. That can be in any individual bad-faith
18 case.

19 But the allegations must start from Point A
20 where there is some basis for those allegations
21 before -- we're basically starting at the broad end
22 and working back to the narrow. That's what I believe
23 has happened in this case, and even with a shifting
24 theory of those allegations as to what the systematic
25 practice is.

1 So we would, whether it is related to the
2 specific objections within our responses or the
3 general objection, which I think is consistent with
4 the responses, we believe that's not proportional, not
5 relational to this case.

6 THE COURT: With regard to the general
7 objection, first of all, I find it would lead to
8 relevant evidence. It's possible it may show an
9 insurer's knowledge, a pattern and practice of
10 inadequate investigation, offering unreasonably low
11 settlement offers.

12 It may be admissible if the punitive damages
13 issue goes to the jury to show reprehensibility.

14 So I find that it is relevant evidence.
15 Therefore, the general objection would not stand.

16 The other general objection that was raised is
17 to claims other than hail damage. I'm going to take
18 that up specifically with regard to individual
19 requests, rather than as a general objection.

20 I did want to also note that with regard to
21 general objections, the rules are pretty specific.
22 Rule 33(b)(4) indicates that grounds for objecting to
23 an interrogatory must be stated with specificity.

24 With regard to Rule 34(b)(2)(B), it also
25 states that with regard to requests for production of

1 documents, that any objection has to be stated with
2 specificity regarding the request, including the
3 reasons.

4 So general objections generally are not
5 sufficient to refuse to respond to an interrogatory or
6 Request for Production of Documents. You have to
7 state your objection with specificity with regard to
8 each particular request that was made.

9 So the general objections are overruled,
10 except to the extent that the request will be reduced
11 to a five-year time period.

12 The first item raised in the motion then is to
13 Interrogatory No. 13, and that requests information
14 about any claims against American Family where they've
15 been a party in an insurance bad faith or unfair
16 claims processing matter.

17 The objection by American Family was that it
18 was overly broad and unduly burdensome and not likely
19 to lead to the discovery of admissible evidence. It's
20 reduced to a five-year time period, but the objection
21 by American Family I find to not have merit.

22 The information requested is information that
23 is relevant and may lead to admissible evidence. At a
24 five-year time period the request is not overly broad
25 and duly burdensome. American Family has the burden,

1 once the Plaintiff has shown relevance, to show how it
2 would be overly broad or unduly burdensome. American
3 Family has not come forward with anything that would
4 meet that burden.

5 Several other Courts in South Dakota,
6 including this Court, have addressed the issue. The
7 Lillibridge case, in particular, found that a similar
8 request was reasonable.

9 So based on the analysis in Lillibridge, I'm
10 going to order American Family to respond.

11 The next request is Request for Production
12 No. 9, and it asks for any documents relating to
13 regulatory actions where American Family's property
14 claims-handling was in question. This request is not
15 limited to South Dakota. It's a nationwide request.

16 The objection by American Family here was that
17 it has information protected by the attorney-client or
18 attorney work-product privileges. And as I previously
19 indicated, if you are claiming attorney-client
20 privilege or attorney work-product privilege, you have
21 to prepare a log. So I will give American Family 14
22 days from today to prepare a privilege log.

23 With regard to the portion of the objection
24 that argues that it's overly broad, unduly burdensome,
25 or not likely to lead to the discovery of admissible

1 evidence, and I should also indicate that I'm also
2 addressing Request for Production of Document No. 10.
3 The two are pretty similar, both seeking regulatory
4 information.

5 But with regard to the general part that it's
6 overly broad, unduly burdensome, or not likely to lead
7 to the discovery of admissible evidence, I find that
8 the objection made is not specific. It doesn't
9 identify how it would be overly broad or unduly
10 burdensome. There is relevant information that could
11 be gathered from this. There is no reason it would be
12 limited to just the State of South Dakota.

13 This Court has addressed similar decisions in
14 the Beyer decision and also in McElgunn and in
15 Lillibridge. So for the reasons set forth in those
16 cases, the objection is overruled, and the motion to
17 compel is granted.

18 The next matter is Request for Production
19 No. 4, which deals with personnel files. The request
20 is for personnel files of everyone involved with
21 Mr. Neugebauer's claim and the supervisors of those
22 individuals.

23 Request for Production of Documents No. 5
24 seeks information about compensation for all employees
25 involved in Mr. Neugebauer's claim and the

1 supervisory.

2 So I'm going to consider those two together.

3 American Family has turned over the claims
4 files of anyone who personally reviewed the claim, but
5 has not turned over the claims files of supervisors up
6 to the heads of the claims department.

7 In Hill vs. Auto-Owners Insurance Company, the
8 District Court in South Dakota considered a similar
9 objection to the supervisors' personnel files, and
10 found that evidence of incentives and disincentives
11 placed on claims handlers by those higher up in the
12 chain of command would tend to affect decisions that
13 the claims handlers made in individual claims; and
14 that that would include bonuses and disincentives
15 applied to those at the head of the claims department,
16 as it would be entirely rational to suppose that such
17 motivational pressure brought to bear on the head of a
18 department would be passed on to those employees in
19 his or her supervision.

20 The same rationale applies here. I think the
21 evidence is relevant. The Defendant has not met their
22 burden to show why it would be unduly burdensome for
23 them to produce the information. There is already a
24 protective order in place to protect the privacy of
25 that information. I don't see any other objection

1 that would outweigh the fact that it's relevant
2 evidence. So the motion to compel is granted.

3 The next is Request for Production 8. This
4 seeks information from American Family from all claims
5 where the claim was initially denied, saying there was
6 no damage, but American Family later determined there
7 was damage to the shingles that were covered under the
8 policy. Mr. Morgans specifically addressed this in
9 his argument.

10 I'm going to narrow the scope of this Request
11 for Production of Documents. Well, first of all, I
12 think it does seek relevant information, but I'm going
13 to narrow the geographic scope. So it would include
14 South Dakota and every state that touches
15 South Dakota; so North Dakota, Minnesota, Iowa,
16 Nebraska, Wyoming, and Montana.

17 It will also be limited to a five-year time
18 period; for the past five years to the present.

19 I think with that narrowed scope, the
20 information should not be overly burdensome or unduly
21 broad.

22 So I'm going to grant the motion to compel in
23 part, and deny it in part, because I'm narrowing the
24 scope.

25 The next one is Request for Production No. 11,

1 which seeks all documents relating to any and every
2 investigation conducted by Heather Steffens. Again,
3 I'm limiting it to the past five years.

4 Request No. 12 seeks all documents, pictures,
5 and reports for every investigation conducted by Trent
6 Nelson and Apex Structural Design on behalf of
7 American Family within the past five years.

8 Both of those requests seek information that
9 is relevant. Heather Steffens is the person who
10 initially conducted the investigation in this matter
11 and initially found there was zero amount of damage.
12 She is an employee of American Family. From what was
13 represented this morning, she's the catastrophic
14 adjustor based out of Iowa, and travels around the
15 country adjusting claims where there is catastrophic
16 loss in an area.

17 So I think that her pictures and reports would
18 produce highly relevant evidence dealing with how
19 American Family adjusts claims from catastrophic
20 losses, like the hail damage here in Sioux Falls.

21 Whether it's done here in South Dakota or
22 anywhere else across the nation goes to how American
23 Family treats all matters dealing with catastrophic
24 losses. So there's no reason to limit it to
25 South Dakota. Limited to a five-year time period, I

1 think that it no longer is unduly burdensome.

2 With regard to Trent Nelsen and Apex
3 Structural Design, although they are not employees of
4 American Family, they've been hired to provide expert
5 review. The only information that's asked for in the
6 Request for Production No. 12 is any work they've done
7 on behalf of American Family; not all work they've
8 done for everyone else. The request, as it's framed,
9 is limited to five years.

10 It does not appear to me to be unduly
11 burdensome or overly broad as it's currently framed,
12 because it's already limited just to the work they've
13 done on behalf of American Family.

14 So the Motion to Compel Request for Production
15 No. 12 is granted in full.

16 I believe that addresses everything. Is there
17 anything I missed?

18 MR. PREHEIM: That addresses all the items
19 that I have noted for this motion.

20 MR. MORGANS: That's my understanding, too,
21 Judge.

22 THE COURT: Mr. Preheim, if you would
23 prepare a draft order for me to review?

24 MR. PREHEIM: Absolutely.

25 THE COURT: Anything else anybody wanted to

1 bring up today?

2 MR. PREHEIM: Two quick items, if I could,
3 Your Honor.

4 The first item is with regards to Request for
5 Production No. 8, which the Court limited it to the
6 surrounding states, what I want to know is if the
7 Court -- depending on what we find on that, is the
8 Court willing to entertain, if we feel it prudent and
9 appropriate, to go beyond, depending on what we find
10 in those North Dakota, Minnesota, Iowa, Wyoming,
11 Montana, in order to establish that this is a
12 nationwide thing instead of just a regional area type
13 of thing.

14 I don't know if the door is closed and the
15 Court is done, or are we able to possibly come back to
16 that later on?

17 THE COURT: If that evidence leads to
18 something that you think would support a nationwide
19 pattern and practice, and you're not able to work out
20 something with American Family regarding broadening
21 the discovery, then you can ask the Court to
22 reconsider.

23 MR. PREHEIM: Understood. The last item is
24 with regards to attorney's fees. Is the Court willing
25 to allow for us to submit an affidavit or a billing on

1 that issue in terms of the Court's order, or do we
2 want to address that now, or basically just wait?

3 THE COURT: If you think you are entitled to
4 attorney's fees, you should file a motion and an
5 affidavit, and then Mr. Morgans will have an
6 opportunity to respond.

7 MR. PREHEIM: Thank you. Understood. I
8 have no other issues then.

9 THE COURT: Mr. Morgans, anything?

10 MR. MORGANS: Nothing further, Judge.
11 Thank you.

12 THE COURT: We'll be adjourned. Thanks.

13 (End of proceedings at 9:37 a.m.)
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1 UNITED STATES DISTRICT COURT
2 DISTRICT OF SOUTH DAKOTA :SS CERTIFICATE OF REPORTER
3 SOUTHERN DIVISION

4 I, Jill M. Connelly, Official United States
5 District Court Reporter, Registered Merit Reporter,
6 Certified Realtime Reporter, and Notary Public, hereby
7 certify that the above and foregoing transcript is the
8 true, full, and complete transcript of the
9 above-entitled case, consisting of Pages 1 - 23.

10 I further certify that I am not a relative or
11 employee or attorney or counsel of any of the parties
12 hereto, nor a relative or employee of such attorney or
13 counsel, nor do I have any interest in the outcome or
14 events of the action.

15 IN TESTIMONY WHEREOF, I have hereto set my
16 hand this 3rd day of August, 2016.

17 /s/ Jill M. Connelly

18
19 _____
20 Jill M. Connelly, RMR, CRR
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22 United States Courthouse
23 400 S. Phillips Avenue
24 Sioux Falls, SD 57104
25 Phone: (605) 330-6669
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